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IN THE

Supreme Court of the United States

70-349

October Term, 1971.

No. ~~1896~~

ROY SPEESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

ROY SPEESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, Roy Speese, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 24, 1971 with an amendment to the opinion on April 2, 1971.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (App. 1a) has not yet been officially reported. The opinion of the United States District Court for the District of New Jersey (App. 18a) is not reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit is dated February 24, 1971 (App. 16a). The order of the United States Court of Appeals for the Third Circuit denying Speese's petition for rehearing is dated April 2, 1971 (App. 15a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where federal regulations governing all aspects of safety aboard the United States' substantially aged merchant vessels provide for the application of safety standards in effect when a vessel is contracted for construction or later contracted for material conversion or repair, should not the Supreme Court review a Court of Appeals' erroneous, retrogressive decision that a vessel built in 1940, withdrawn from navigation in 1962 and contracted for repairs to return to navigation in 1965 need not meet 1965 current minimum mandatory uniform safety requirements, but rather, pre-November 19, 1952 non-mandatory requirements, since the Court of Appeals decision will create uncertainty as to whether United States maritime workers and passengers will receive the benefit or current safety regulations which Congress intended to provide and will render inapplicable current uniform minimum mandatory safety requirements for over 60% the operating merchant fleet and 100% of the reserve fleet?

2. Should not the Supreme Court review an erroneous Court of Appeals' decision urged by the Government as party litigant shipowner through private counsel where the interest of the Government as author and enforcer of vessel safety regulations transcends its interest as a party litigant and the Government would be unable in the

future to take an effective contrary position in applying its safety regulations to privately owned vessels which comprise almost the entire United States merchant fleet?

REGULATORY PROVISIONS INVOLVED.

46 C. F. R.

90.01 AUTHORITY AND PURPOSE

90.01-1 Purpose of regulations

90.01-1(a) The purpose of the regulations in this subchapter is to set forth uniform minimum requirements for cargo and miscellaneous vessels, as listed in Column 5 of Table 90.05-1(a), in accordance with the intent of Title 52 of the Revised Statutes and acts amendatory thereof or supplemental thereto, as well as to implement various International Conventions for Safety of Life at Sea and other treaties which affect the merchant marine. The regulations are necessary to carry out the provisions of law affecting cargo and miscellaneous vessels and such regulations have the force of law.

90.05-5 Specific application noted in text

90.05-5(a) At the beginning of the various parts, subparts, and sections, a more specific application is generally given for the particular portion of the text involved. This application sets forth the types, sizes, or services or vessels to which the text pertains, and in many cases limits the application of the text to vessels contracted for before or after a specific date. As used in this subchapter, the term "vessels contracted for" includes not only the contracting for the construction of a vessel, but also the contracting for a material al-

teration to a vessel, the contracting for the conversion of a vessel to a cargo and miscellaneous vessel, and the changing of service or route of a vessel if such change increases or modifies the general requirements for the vessel or increases the hazards to which it might be subjected.

97.37-1 Application

97.37-1(a) The provisions of this subpart, with the exception of Section 97.37-90, shall apply to all vessels contracted for on or after November 19, 1952. Vessels contracted for prior to November 19, 1952. Vessels meet the requirements of Section 97.37-90.

97.37-37(e) Where mechanical disengaging apparatus is used, the control effecting the release of the lfieboat shall be painted bright red and shall have thereon in raised letters either the words—"DANGER —LEVER DROPS BOAT", or the words—"DANGER—LEVER RELEASES HOOKS".

97.37-37(f) The top of thwarts, side benches and footings of lifeboats shall be painted or otherwise colored international orange. The area in way of the red mechancial disengaging gear control lever, from the keel to the side bench, shall be painted or otherwise colored white, to provide a contrasting background for the lever. This band of white should be approximately 12 inches wide depending on the internal arrangements of the lifeboat.

97.37-90 Vessels contracted for prior to November 19, 1952

97.37-90(a) Vessels contracted for prior to November 19, 1952, shall meet the requirements of this paragraph.

97.37-90(a)(1) The requirements of Sections 97.37-5 through 97.37-47 shall be met with the exception that existing signs and markings containing the same general intent, but not necessarily identical wording or exact letter type, size, or color, may be retained so long as they are in good condition to the satisfaction of the Officer in Charge, Marine Inspection.

STATEMENT OF THE CASE.

This action was brought by Petitioner, a maritime worker, under the Maritime Law, against the United States of America, as owner of the vessel, SS "Exhibitor", pursuant to 46 U. S. C. Sec. 741 et seq. On November 5, 1965, Speese, a painter employed by New York Shipbuilding Corporation, sustained totally disabling injuries, including multiple body fractures, when a lifeboat aboard the SS "Exhibitor" in which he was ordered to paint, fell 35 to 50 feet from the vessel into the Delaware River.

The Government did not join New York Shipbuilding Corporation as a third party defendant. The Government has been represented by private counsel in all proceedings before the District Court and the Court of Appeals.

The District Court for the District of New Jersey, after a non-jury trial, entered judgment for the Government. The Court of Appeals for the Third Circuit affirmed the judgment. This petition seeks a review of the Court of Appeals' judgment because the Court of Appeals based its judgment on an interpretation of federal regulations not previously decided by the Supreme Court, or any other court, and which raises an important question of federal law.

The SS "Exhibitor" had been out of navigation from December 14, 1962 to October 2, 1965 and in the "mothball" fleet. The Government, acting through the National Ship-

ping Authority, decided to reactivate the vessel. The Authority prepared specifications for contractor bids. The Government's work specifications encompassed not only the vessel itself, but its two lifeboats.

On August 26, 1965, a Master Lump Sum Repair Contract was signed by the Government and New York Shipbuilding Corporation which awarded the repair work to New York Shipbuilding Corporation. The contracted work involved approximately 499 specific items, including painting of the lifeboats, at a total cost in excess of $440,000.00.

From on or about October 2 to October 4, 1965, the SS "Exhibitor" was towed to New York Shipbuilding Corporation. The repair work commenced on October 5, 1965.

From October 5, 1965 to November 5, 1965, when Speese was injured, the lifeboat involved in the accident and its mechanical disengaging apparatus was regularly inspected by the Government's employee, Ivans, a Coast Guard inspector. The purpose of the mechanical disengaging apparatus, in normal operation, is to permit the lifeboat to be freed of its support wires after it is lowered into the water. The releasing mechanism is activated by moving the lever, a piece of pipe which is located on the floor of the lifeboat, upward. The lever's rotation causes the attached shaft to turn which causes the support wire hooks on each end of the lifeboat to come off the support wires so the lifeboat will drop.

Prior to the vessel's delivery to New York Shipbuilding Corporation, the Government recognized that the releasing gear's misuse had resulted in serious accidents; the Government recognized that if the releasing gear was entrusted to an untrained individual, there would be created the risk of serious personal injury. A Government publication dated March 1, 1965 stated (339a-340a) [1]:

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1. Appendix to the Briefs filed in the Court of Appeals.

"While releasing gear helps to safely launch a boat in a seaway, its careless or unintentional use has led to serious accidents. Regulations require that *the lever be painted red and marked:* DANGER—LEVER DROPS BOAT. . . . It is a helpful device in competent hands, but if it is entrusted to an untrained individual, it could be misused and cause a serious accident." (Emphasis supplied.)

Specifically, U. S. Coast Guard Regulations, 46 C. F. R. Secs. 97.37-1(a), 97.37-37(e), (f) require that "all vessels contracted for on or after November 19, 1952" must provide a warning on the release lever itself of the risk and purpose of its use. The minimum warning prescribed in Sec. 97.37-37(e) is "DANGER—LEVER DROPS BOAT" or "DANGER—LEVER RELEASES HOOKS". 46 C. F. R. Sec. 90.05-5(a) provides a uniform definition throughout all the regulations of "vessels contracted for" to apply to contracts for the construction or repair or conversion of vessels.

When the lifeboat involved in Speese's accident arrived at New York Shipbuilding Corporation, there was no warning on the lever itself. The rotating shaft of the apparatus contained a plate with the words "DANGER LEVER RELEASES HOOKS". Nonetheless, the Government's work specifications for New York Shipbuilding did not require the placing of an appropriate warning on the lever itself.

Work was performed on the lifeboat ashore for over three weeks prior to Speese's accident. During this time, the lifeboat was inspected on five different occasions by the Government's employee, Ivans. Although he intended to require the placement of an appropriate warning on the lever itself, he did not do so prior to Speese's accident. He testified (39a-40a) [2]:

2. Appendix to the Briefs filed in the Court of Appeals.

"Q. In the inspection of this ship and in the inspection of other lifeboats that you have done, isn't——

A. Yes.

Q. —one of the standard things you check for——

A. Yes.

Q. Let me finish.

—is the location of the word warning on the lever itself?

A. *It is on the lever itself.*

Q. And you check for this?

A. Yes.

Q. And if it isn't there then you make certain that it gets there?

A. Yes, sir." (Emphasis supplied.)

On the morning of Speese's accident, at the shipyard's paint shanty, the painter foreman instructed him to go to the lifeboat and paint a gear red and white border around it. Prior to this time, Speese had not painted in a lifeboat. From his experience, Speese had no knowledge of the purpose and/or operation of the gear that he was ordered to paint; he received no instruction as to its purpose and/or operation; he received no instruction not to lift it.

Speese went aboard the vessel and entered the lifeboat. The lifeboat was in an outboard position, over the side of the vessel, about 35 to 50 feet above the river. It was secured only by the lifeboat's support wires.

He identified the gear he was to paint which was in fact the lifeboat's mechanical disengaging control lever. Although Speese had no recollection of his accident, the District Court found that the lifeboat fell to the water because Speese rotated the control lever so that he could paint it.

The core of Speese's negligence claim was based upon the Government's undisputed failure prior to Speese's ac-

cident to order compliance with the post-November 19, 1952 mandatory minimum requirement that an appropriate warning be placed on the lifeboat release lever itself. Had there been compliance with this requirement, Speese's accident would not have happened. The applicability of the post-November 19, 1952 requirement was based on the August 26, 1965 repair/conversion contract between the Government and New York Shipbuilding Corporation, which constituted the latest date that the "vessel was contracted for".

The District Court, however, held that there was no violation of Coast Guard regulations because 46 C. F. R. Sec. 97.37-1(a) and 97.37-90, which governs "vessels contracted for prior to November 19, 1952" were applicable to the SS "Exhibitor" which was built in 1940. Sec. 97.37-90 grants discretion to the Marine Inspector to approve the *content* of signs and markings which do not conform to post-November 19, 1952 requirements so long as the content contains the same general intent as the post-November 19, 1952 requirements. This section, however, does not grant any discretion to the Marine Inspector to deviate from the post-1952 requirements as to the *location* of signs and markings.

Moreover, the District Court did not consider 46 C. F. R. Sec. 90.05-5(a) which does not limit the definition of "vessel contracted for" to contracts for construction, but does expressly include within its meaning contracts for conversion and/or repair.

The Court of Appeals affirmed the District Court's conclusion.[3] That Court, in an amendment to its opinion,

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3. The District Court and the Court of Appeals both stated that the Government's expert witness, an insurance manager for a private company who was a lieutenant in the Coast Guard when released in 1964, testified that the plate's content and location on the shaft complied with regulations. Both Courts, however, apparently did not

did consider that the SS "Exhibitor" was "a vessel contracted for" after November 19, 1952. Nonetheless, the Court held that the post-November 19, 1952 mandatory requirement that an appropriate warning be placed on the release lever itself was inapplicable. The Court held that when a vessel has more than one date that it was "contracted for" that the *earliest* rather than the *latest* date controls the determination of the applicable regulations. This Petition for Certiorari seeks a review of that holding.

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3 (cont'd)

turn their decision on this testimony since the interpretation of these regulations is a question of law, not fact. The Court of Appeals also cited 46 C. F. R. Sec. 97.37-3(a). However, this section also applies only to content of markings, not to their location. In light of the stated purpose of this section, the authority given the Marine Inspector to omit markings applies to the minimum requirements of the regulations where other markings exist. It does not authorize the Marine Inspector to permit no warnings at all.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals' Erroneous, Retrogressive Interpretation of Coast Guard Regulations Affects the Entire Body of Safety Regulations Governing the United States' Substantially Aged Merchant Fleet; It Is Contrary to the Intent of Congress and the Regulations to Provide Current Uniform Minimum Mandatory Safety Regulations for the Now 163,686 Workers in the United States Maritime Industry as Well as Passengers on United States Ships; It Will Render Inapplicable Current Uniform Minimum Mandatory Safety Requirements for Over 60% of Our Operating Merchant Fleet and 100% of Our Reserve Fleet.

2. The Court of Appeals' Acceptance of the Erroneous Interpretation of Coast Guard Safety Regulations Urged by the Government as a Party Litigant Shipowner, Through Private Counsel, Will Prevent the Government, as Author and Enforcer of These Regulations, From Effectively Taking a Contrary Position in Applying These Regulations in the Future to Privately Owned Vessels Which Comprise Almost the Entire United States Fleet.

46 U. S. C. Sec. 481 authorizes the Secretary of the Treasury to prescribe rules and regulations for United States merchant vessels "to provide against hazard to life and property". Also see: 46 U. S. C. Secs. 375, 416. Pursuant to this authority the Coast Guard has promulgated rules and regulations which set forth the *minimum* requirements [4] for cargo and passenger vessels, 46 C. F. R. subchapter H,I.[5] These regulations comprehensively cover subjects such as inspection and certification; construction and arrangement; stability; life saving equipment; fire

4. See: 46 C. F. R. Secs. 70.01-1, 90.01-1.

5. Vessels owned by the Government through the Department of Commerce are subject to Coast Guard Regulations, 46 U. S. C. Sec. 363.

protection equipment; vessel control and miscellaneous systems and equipment.

These regulations have not remained static. The minimum requirements have been periodically up-graded to reflect accumulated experience and developing technology. The post-November 19, 1952 mandatory requirement that an appropriate warning be placed on the life boat release lever itself typifies such changes.

Prior to November 19, 1952, there were no regulations governing warnings on lifeboat mechanical disengaging apparatus for lifeboats constructed prior to August 17, 1949. 46 C. F. R. Sec. 160.033-3(b) required that lifeboats constructed after August 17, 1949 contain a warning on the release lever itself.

On November 19, 1952, the requirement that a warning be placed on the release lever itself became effective for "vessels contracted for" on and after that date, 46 C. F. R. Sec. 97.37-37(e),(f), 17 F. R. 9279 (1952).

In 1957, 22 F. R. 4021 (1957), the content of the warning was changed for lifeboats constructed thereafter and amended for existing lifeboats. "DANGER—LEVER DROPS BOAT" became the sole required minmium warning for new lifeboats and an alternative warning for existing lifeboats.

These regulations and their subsequent up-grading reflected the Government's determination that individuals untrained in the mechanics of lifeboats, such as Speese, could sustain and had sustained serious injury while using the lifeboat release lever. The purpose of these regulations was to give untrained individuals a meaningful warning of the risk of handling the release lever so that serious injury could be avoided by the lever's misuse.

The constant regulation requirement that the warning be on the lever itself was to provide the greatest likelihood that an untrained individual would come in contact with

the warning since he would have to handle the very thing on which the warning was placed to activate the release mechanism. A warning located any other place other than the lever itself was subject to be covered/hidden or overlooked or misinterpreted.

The method utilized throughout *all* the regulations to introduce *uniform* minimum safety standards on pre-existing vessels is to require compliance with current regulations at the time of a pre-existing vessel's material alteration or repair, as in the case of the SS "Exhibitor". This is precisely the reason that 46 C. F. R. Sec. 90.05-5(a) provides that the date "a vessel is contracted for", the date that determines which regulations apply, includes the date of a contract materially to repair or alter a vessel.

The Court of Appeal's decision which in effect limits the determination of applicable Coast Guard regulations to the date of a vessel's contract for construction is thus contrary to the clear meaning and intent of the regulations. When this holding is superimposed on the United States' senile merchant fleet, its effect is to eliminate from current uniform minimum mandatory safety requirements over 60% of the United States' merchant fleet, approximately 75% of the United States' foreign trade fleet, and 100% of the United States' reserve or mothball fleet, to which the SS "Exhibitor" belonged prior to Speese's accident.

The Merchant Ship Register I, II, U. S. Department of Navy, October, 1970, states inter alia:

"MSC-3D INVENTORY OF U. S. FLAG MERCHANT SHIPS
(Ocean-going ships 1000 gross tons and over)
(In Thousands of Deadweight Tons) 30 September 1970

	Total Ships		Privately-Owned U. S. Flag		Maritime Administration Ships			
					Operating		Laid-Up	
	No.	Dwt.	No.	Dwt.	No.	Dwt.	No.	Dwt.
TOTAL ALL TYPES	1740	22,602.0	840	14,853.5	5	50.5	895	7,698.0

. . . .

AGE DISTRIBUTION U. S. FLAG PRIVATELY OWNED FLEET

MSC-3D 30 September 1970

	Total Ships	*Under 5 Yrs.*	*5-9 Yrs.*	*10-14 Yrs.*	*15-19 Yrs.*	*20-24 Yrs.*	*25 Yrs. & Over*
TOTAL FLEET	840	79	125	58	71	139	368
(percent)	(100)	(9)	(15)	(7)	(8)	(17)	(44)"[6]

Andrew E. Gibson, Administrator of the Maritime Administration, in Hearings Before a Subcommittee on Appropriations, U. S. House of Representatives, March 25, 1970, testified, at p. 1154:

> "The present U. S. foreign trade fleet consists of approximately 650 ships, which carry about 6 percent of the U. S. oceanborne foreign trade. Approximately three-fourths of this U. S. foreign trade fleet is now over 20 years of age, having been constructed in World War II, compared to the world fleet only one-fourth of which is 20 years old."

Our maritime industry is one in which there are well recognized substantial risks of serious injury. Discretionary safety regulation by a marine inspector on our pre-November 19, 1952 ships, as held by the Court of Appeals, does not guarantee or provide the same post-November 19, 1952 uniform safety regulation which was designed to reduce the risk of injury for marine workers and travelers.

The Congressional intent[7] "to provide against hazards to life and property" for United States maritime workers and passengers on United States vessels can best be effectuated by requiring that our old ships while in service, at the time of their repair or conversion, or when returned to

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6. All vessels in the reserve fleet were constructed in the first half of the 1940's. Merchant Marine Ship Register XI, pp. 29-64.

7. See U. S. Code Cong. and Admin. News pp. 2283-2289 (1959) for the legislative history which describes the purposes of enabling legislation which authorizes Coast Guard safety regulations.

service from the reserve fleet meet current uniform minimum mandatory safety requirements. For the purpose of minimum uniform safety for the now 163,686 United States maritime workers [8] as well as the passengers on United States vessels, there is no justification for treating differently a vessel constructed in 1965 and one, such as the SS "Exhibitor", which was withdrawn from navigation and reactivated in 1965. Nor is there any justification after November 19, 1952 for providing different minimum safety standards for maritime workers who work is or on reactivated vessels based upon whether they were constructed before or after November 19, 1952.

Moreover, the mandate of post-November 19, 1952 safety requirements upon our old ships when they are repaired or converted creates no significant economic burden on the vessel owner since the vessel has already been withdrawn from its business enterprise to be refitted to continue with or return to commerce.

The Court of Appeals holding is the first determination of the issue here raised. The Supreme Court now should review this issue rather than await other lower courts' rulings on this question because [9]:

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8. According to the U. S. Department of Commerce, U. S. Department of Commerce News, Merchant Marine Data Sheet, January 1, 1971, there are 163, 868 workers in the United States maritime industry. There are 35,933 seamen, 59,853 shipyard workers, and 67,900 longshoremen employed or employable on or about our aged merchant fleet.

9. There are other issues decided by the Court of Appeals which cry out for review. For example, the Court held (App. 13a): "Here appellant did not show that the Government intended to retain control over the ship, or that it had accepted responsibility for safety operations while repairs were ongoing". In reaching this significant conclusion the Court did not consider the undisputed documentary evidence that the Government's employees had observed and corrected at least twenty-one unsafe activities and/or unsafe conditions while the vessel was being repaired, (325a-336a) Appendix to the Briefs in the Court of Appeals.

1. The Court of Appeals' holding is erroneous and it affects not only the interpretation of the regulations applicable to Speese's accident, but the entire body of regulations governing merchant vessels; it is contrary to the intent of Congress and the purpose of the regulations to provide current uniform mandatory minimum safety standards for the now 163,686 workers in the United States maritime industry as well as passengers on all United States ships.

2. The Government appears in this case in two separate capacities which are potentially conflicting. It is here as a party defendant shipowner represented by private counsel with an interest in the outcome of this litigation. It is also here as the author of the legislation and regulations which it must enforce to provide minimum uniform safety requirements for the workers and travelers on our aged merchant fleet which is substantially privately owned. The Government as litigant ship owner, through private counsel, has urged the interpretation of the regulations reached by the District Court and Court of Appeals. In the future, the Government, as regulation promulgator and enforcer, could not, therefore, take an effective contrary position in applying the regulations to privately owned vessels which comprise almost our entire merchant fleet. Basic fairness should require the Government now to speak in its Governmental capacity through Government counsel rather than when the regulations are applied to a private vessel owner and the Government has no apparent private interest in the outcome of the dispute.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 18,851.

ROY SPEESE, *Appellant*

v.

UNITED STATES OF AMERICA

Present: FORMAN, SEITZ and ALDISERT, *Circuit Judges.*

ORDER.

ORDERED that footnote 8, page 6, of the opinion filed herein on February 24, 1971 be and the same is hereby amended by the addition of the following:

> In the case of the S.S. Exhibitor, where the "construction" of the vessel was contracted for prior to November 19, 1952 but its "material alteration" was effected after that date, it appears beyond doubt that the Marine Inspection officer may in his discretion determine the propriety of the safety warnings and they may remain in effect "so long as" he finds that they contain the same general intent as the post-1952 warnings and are in good condition, in accordance with § 97.37-90(a)(1).

By the Court,

PHILLIP FORMAN,
Circuit Judge.

Dated: April 2, 1971

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 18,851.

ROY SPEESE, *Appellant*

v.

UNITED STATES OF AMERICA

(D. C. Civil Action No. 34-67.)

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued October 30, 1970

Before FORMAN, SEITZ and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT.

(Filed February 24, 1971.)

FORMAN, *Circuit Judge.*

This appeal was taken by Roy Speese from a judgment of February 16, 1970 of the United States District Court for the District of New Jersey in favor of defendant, United States of America and against plaintiff, Mr. Speese. The suit, brought under 46 U.S.C. § 741 *et seq.*, was instituted for injuries sustained by appellant, a maritime worker employed by the New York Shipbuilding Corporation of Camden, New Jersey, when a lifeboat in which he

was to paint the gear of its release mechanism, fell 35 to 50 feet into the Delaware River on November 5, 1965. Appellant asserted claims for both negligence and unseaworthiness in the District Court, but is here only to test the propiety of the judgment of the District Court based on his claim of negligence.

The accident of which appellant complained occurred aboard the S.S. Exhibitor, owned by the United States. It had been built in 1940, was decommissioned at the end of 1962, and stored in the "mothball" fleet until October 2, 1965, when the Government determined to reactivate it. Accordingly, a contract was awarded to the New York Shipbuilding Corporation for the overhaul of the ship, covering approximately 499 specific items, at a cost of $440,000. Several of those items pertained to the S.S. Exhibitor's lifeboats, and were for their removal from her hold where they were stowed, and for reconditioning and restoration to their launching rigs. On November 5, 1965, appellant was directed by his foreman to enter the port lifeboat and paint the gear of its release mechanism red, with a six-inch outline border of white. Appellant thereupon climbed into the lifeboat with his pots of paint and brushes. He stepped into the place in which he was to work and was about to bend down to brush some shavings out of the way when the accident occurred. Although appellant remembered nothing of the accident thereafter, the District Judge found that he disconnected the lifeboat from its lowering lines by activating the release mechanism. The lifeboat plummeted some 35 to 50 feet below, from which appellant suffered serious injuries. Under 29 C.F.R. § 1501.56, shipyard employees may not work in a lifeboat unless it is secured independently of the releasing gear by safety wires, but these wires had been removed prior to the accident in preparation for a weight test on the lifeboat.

The case was tried to the District Judge without a jury, and in his Findings of Fact and Conclusions of Law he held that the Government was not guilty of negligence *per se,* since it had not violated Coast Guard Regulation 93.37-37(e) [1] and was not in control of the repair operations. It was further found that the Government was not guilty of ordinary negligence, since it was not in control, did not breach any duty of care with respect to appellant and neither its action nor its inaction was the proximate cause of appellant's injuries. On the contrary, the District Judge held that either apellant's own negligence, or that of the independent contractor, New York Shipbuilding, or the combination of the two, were the proximate cause of the injuries.[2]

The scope of this court's power of review was expressed in McAllister v. United States: [3]

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases then they exer-

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1. 46 C.F.R. § 97.37-37 (1970) (Lifeboats)

"(e) Where mechanical disengaging apparatus is used, the control effecting the release of the lifeboat shall be painted bright red and shall have thereon in raised letters either the words—'DANGER—LEVER DROPS BOAT,' or the words—'DANGER—LEVER RELEASES HOOKS.'"

2. Civ. No. 34-67 (D.N.J., Feb. 16, 1970)

"The plaintiff courted his own injuries when he activated the release gear. He cannot, upon any principle of law, predicate his damages upon the defendant's mere ownership of the vessel. Defendant's agents did not control the vessel but exercised only the right of inspection. Such inspection was made in a reasonable and prudent manner and did not insure against the negligence of the shipyard, its employees, or the plaintiff himself."

3. 348 U.S. 19, 20 (1954).

cise under Rule 52(a) of the Federal Rules of Civil Procedure."

A threshold contention raised by appellant is that this general rule is inapplicable where "(t)he ultimate findings of fact were predicated upon inferences drawn from evidence as to which there was no disagreement," *Soles v. Franzblau.*[4] Both *Soles* and *Surgical Supply Service, Inc. v. Adler,*[5] cited for the same proposition, are inapposite here. In *Soles,* a wrongful death action, plaintiffs contended that the structure of an apartment building did not satisfy state statutory requirements providing for access to independent stairwells in case of fire emergencies. The "undisputed" evidence consisted simply of proof that no independent stairwells existed. *Surgical Supply* involved a challenge to a trial court's decision that the appellant was guilty of unfair competition, and the evidence was comprised solely of two pamphlets distributed by the competing business enterprises, and the uncontradicted testimony of one witness. Clearly, the present case, in which the conflicting testimony of witnesses and experts for both appellant and appellee, as well as contract provisions and Coast Guard regulations requiring interpretation, were introduced, does not fall within the exception to the "clearly erroneous" test enunciated in *Soles* and *Surgical Supply.* Hence, the rule of *McAllister* is appropriate to this case, and the findings of fact of the District Judge may not be overruled unless clearly erroneous.

I.

Appellant contends that the District Judge erred in not finding the Government guilty of negligence *per se,*

4. 352 F.2d 47, 50 (3 Cir. 1965), *cert. den.* 383 U.S. 911 (1966).

5. 321 F.2d 536 (3 Cir. 1963).

arguing that, contrary to the court's finding, the Government had violated Coast Guard Regulation 97.37-37(e).[6] Appellant urges that the warning legend DANGER—LEVER DROPS BOAT, rather than the warning DANGER—LEVER RELEASES HOOKS, should have appeared in the lifeboat in which appellant's accident occurred. Appellant argues further that to comply with the requirements of the regulation that the warning be placed on "the control effecting the release of the lifeboat," it should have been positioned on the release lever itself and not, as in the lifeboat in question, on the surrounding control mechanism. An examination of the pertinent Coast Guard regulations and the reasoning of the District Judge, however, demonstrates that his decision was entirely consistent with statutory requirements.

As the District Judge found, 97.37-37(e) specifically permits either warning legend—DANGER—LEVER DROPS BOAT, or DANGER—LEVER RELEASES HOOKS—to be placed in lifeboats. Appellant's argument that Coast Guard revisions of 97.37-37(e) retained the earlier warning DANGER—LEVER RELEASES HOOKS only for the convenience of vessel owners whose slips were in navigation, and that this legend should have been changed to DANGER—LEVER DROPS BOAT while the S.S. Exhibitor was undergoing repairs, is without merit. Equally so is appellant's argument that the warning in question materially violated the regulations because it lacked the required dash between the words DANGER and LEVER and could therefore be construed as referring to a separate piece of equipment called a "DANGER LEVER." This contention is so farfetched that it does not deserve serious recognition.

Neither can this court accept appellant's contention that the location of the warning deviated from Coast

6. See note 1, *supra*.

Guard requirements. Coast Guard Regulations 97.37-90(a) and (a)(1) [7] specify that in the case of vessels contracted for prior to November 19, 1952, existing signs and markings which do not comply with subsequent changes in the regulations may be retained if they are similar in intent to new regulations, and are found to be in good condition by the officer in charge of Marine Inspection. The S.S. Exhibitor, built in 1940, falls squarely within the words of this "grandfather" clause. In addition, the markings on the S.S. Exhibitor had been inspected and approved by Marine Inspection officers.

Appellant's assertion that the "grandfather" clause does not apply here because the repair contract was entered into in 1965 is also unsupportable.[8] The District

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7. 46 C.F.R. § 97.37-90 (1970) (Vessels contracted for prior to November 19, 1952.)

"(a) Vessels contracted for prior to November 19, 1952, shall meet the requirements of this paragraph.

"(1) The requirements of §§ 97.37-5 through 97.37-50 shall be met with the exception that existing signs and markings containing the same general intent, but not necessarily identical wording or exact letter type, size, or color, may be retained so long as they are in good condition to the satisfaction of the Officer in Charge, Marine Inspection."

8. Appellant cites Coast Guard Regulation 90.05-5(a) for the proposition that where a repair contract for a vessel has been entered into after November 19, 1952, the vessel does not fall within the "grandfather" clause, §§ 97.37-90(a) and (a)(1). 46 C.F.R. § 90.05-5(a) (1970) provides that:

§ 90.05-5(a):

". . . . As used in this subchapter, the term 'vessels contracted for' includes not only the contracting for the construction of a vessel, but also the contracting for a material alteration to a vessel, the contracting for the conversion of a vessel to a cargo or miscellaneous vessel, and the changing of service or route of a vessel if such change increases or modifies the general requirements for the vessel or increases the hazards to which it might be subjected." Contrary to appellant's assertion, the more reasonable interpretation of this section is simply that the "grandfather" clause applies both to contracts for the construction or repair of vessels entered into prior to November 19, 1952.

Judge, presented with Coast Guard regulations and conflicting expert testimony,[9] determined that the officer in charge of Marine Inspection possessed wide discretion to approve the markings on boats falling within the scope of the "grandfather" clause, 97.37-90(a) and (a)(1),[10] and that such discretion had not been abused in approving the danger warnings which appeared on the S.S. Exhibitor's lifeboats. From an examination of the pertinent Coast Guard regulations, the District Judge's reasoning, and photographs illustrating the position of the warning on the lifeboat under consideration, it is clear that the findings and conclusions of the District Judge on this issue were entirely appropriate. Thus, appellant's contention that the Coast Guard Regulation 97.37-37(e) was violated by the Government is not sustained.

II.

Appellant argues that even if the Government was not guilty of negligence *per se*, it was guilty of ordinary negligence, contrary to the finding of the District Judge. In support of this allegation, appellant contends that the Government retained control over safety precautions while the repair work was in progress, and was under a non-delegable duty to provide a safe place to work for ap-

9. Appellant's expert, John Harkrader, testified that the warning should appear on the shaft of the release lever itself, while appellee's expert, John Hihn, testified that Marine inspectors possessed discretion in specific cases to approve warnings located on the control of the release lever.

10. See 46 C.F.R. § 97.37-3(a). (1970):

"It is the intent of this subpart to provide such markings as are necessary for the guidance of the persons on board in case of an emergency. In any specific case, and particularly on small vessels, where it can be shown to the satisfaction of the Officer in Charge, Marine Inspection, that the prescribed markings are unnecessary for the guidance of the persons on board in case of emergency, such markings may be modified or omitted." See also § 97.37-90(a)(1), *supra*, note 7.

pellant. Appellant argues further that the Government violated its duty of care since it had knowledge of the dangerous condition and permitted it to continue, knowing that persons untrained in the mechanics of lifeboats could sustain, and had sustained, serious injury in the past.

The duty of care owed by the Government to appellant depended upon the degree of control over the S.S. Exhibitor retained by it during the repair operation, and not on its mere ownership of the vessel. In *West v. United States*,[11] on a similar argument by an employee of an independent contractor who had sustained injuries while engaged in repair work on a ship, the Court stated that:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe."[12]

This rule has been applied by other courts presented with adjudications involving a determination of the extent of responsibility owed by the Government to employees of independent contractors engaged in the repair of Government-owned ships. Thus, in *McKinney v. United States*,[13] where such an employee was injured by breathing fumes generated when he welded, the court found that the Government was not negligent since the employee:

> ". . . was solely an dexclusively subject to the supervision of Lockheed supervisory personnel in the performance of his duties. No naval personnel issued any orders or directions to McKinney relating to the manner of performance of his work or to the safety

11. 361 U.S. 118 (1959).

12. *Id.* at 123.

13. 368 F.2d 542 (9 Cir. 1966).

> precautions which should be observed. No Navy personnel were ever aboard the mid-body section except for inspectors who checked to see if the work was being done pursuant to the contract specifications." [14]

Likewise, in *McDonald v. United States*,[15] where a painter employed by an independent contractor sustained injuries while engaged in the repair of a ship preparatory to its being placed in the "mothball" fleet, and claimed that the Government had failed to provide him with a safe place to work, the court denied recovery and stated that:

> "The shipowner in possession and control owes a duty of reasonable care to workmen who come aboard the vessel to make repairs. The duty is to exercise reasonable care to furnish the workmen with a safe place to work [citations]. However, the test of the shipowner's responsibility is possession and control. Where, as here, possession and control of the vessel are relinquished to an independent contractor, the shipowner owes no duty to the contractor's employees.[16]

Since in the present case the New York Shipbuilding Corporation was clearly an independent contractor, the burden of proof rested upon appellant to demonstrate that the Government had retained control of safety precautions while repairs were in progress. On the basis of the testimony of witnesses for appellant and appellee, including the testimony of appellant himself, and on a consideration of the contract between the Government and New York Shipbuilding, the District Judge found that appellant had not sustained his burden of showing that the Government retained control over safety precautions on the S. S. Ex-

14. *Id.* at 543.

15. 321 F.2d 437 (3 Cir. 1963), *cert. den.* 375 U.S. 969 (1963).

16. *Id.* at 440-441. See also *Allen v. United States*, 178 F. Supp. 21 (E.D. Pa. 1959).

hibitor. A review of the record as a whole indicates that this decision was proper.

Robert Irving Ivans, an inspector for the Coast Guard Marine Inspection Office, testified that his function aboard the S. S. Exhibitor was to assure that the repair work complied with Coast Guard regulations.[17] To this end, he could request changes and repairs in work which he found did not meet Coast Guard specifications. Such requests were submitted to John Murtha, a representative of the Maritime Administration, for ultimate approval. Mr. Ivans testified that, of the three Government employees aboard the ship, one was authorized to approve repairs and the other two to assure that the repairs satisfied Coast Guard regulations. He stated that he had inspected the lifeboat in which appellant was injured and found its disengaging apparatus to be in satisfactory condition. In addition, he stated that when the lifeboat was placed back on the ship after repair, he was only to see that the water weight test was performed to his satisfaction as inspector. He further testified that employees of New York Shipbuilding had rigged the lifeboat in outboard position. He was not present

17. On direct examination Mr. Ivans testified as follows regarding his duties with respect to repair operations:

"Q. . . . I am trying to find out what your duties were, sir."

* * *

"A. If they [repairs] did not meet the Coast Guard requirements applicable to the lifeboats, then I would write up the requirements on it, stating it was more or less unsatisfactory, and that is as far as I went with it.

"Q. And, of course, the purpose of that is so that changes could be made by the contractor; is that right?

"A. Well, eventually, yes, the contractor or the ship's force."

* * *

". . . I didn't care who did it, just—

"Q. As long as it was done?

"A. As long as it was done satisfactory to my office.

"Q. Fine. And by your office you mean the Coast Guard?

"A. I mean the Coast Guard Marine Inspection office."

when that was done, but stated that no warnings are usually given that such a test is about to be performed.

An employee of the contractor, Edward W. Eldred, Jr., later testified that as rigging subforeman his duties included supervising the rigging of lifeboats onto vessels and assigning crews to do the work. He further testified that he could make changes if he saw something he did not like.[18] Appellant himself testified that he was under the direct supervision of his foreman, an employee of the contractor, and that his foreman had instructed him to paint the lifeboat without giving any warning of the possible dangers involved. This testimony, as well as the contract between the Government and New York Shipbuilding[19]

18. On direct examination Mr. Eldred testified as follows:

"Q. Now, as Rigger Subforeman . . . what were your duties, Mr. Eldred?

"A. Well, everything pertaining to repair work, as far as rigging goes."

* * *

"Q. As part of your duties at that time, did they include rigging lifeboats onto vessels?

"A. Yes, to supervise it and assign the work to a crew, . . . and if I see something I don't like, I change it . . ."

"Q. Now, did you or your men have anything to do with putting the lifeboats back onto the Exhibitor before the accident?

"A. Oh, definitely; *we were the only ones could do it.*" [Emphasis supplied.]

19. Appellant argues that the Government's retention in the contract of a right to have safeguards installed upon its request is not consonant with a relinquishment of control. Other contract provisions, however, [indicated that the contractor] was to have charge of and be responsible for the vessel "from the time the Contractor's lines are secured to the vessel until such time as all of the Contractor's lines are cast off"; that "(d)uring the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the Authority at any and all times and places"; and that Government personnel "assigned to duty on the vessel shall have access to the vessel at all times, provided such personnel shall not be permitted to interfere with the work of the Contractor's workmen." These provisions effectively refute the contention that the Government retained control over safety precautions on the ship.

support the inference that the Government had relinquished control of the S.S. Exhibitor, and that Government employees were present only in the capacity of inspectors. In this respect, the present case differs from *Kleveland v. United States*,[20] much relied on by appellant, where the Government was held liable for the injuries of an employee of an independent contractor engaged in ship repair work on the finding of the court that:

> "The conduct of the parties itself indicates that the United States took responsibility for making a check of the ship's accessories after years of disuse, and it is liable for failure to use due care in this although not for defects produced by Agmarine's [the contractor] own work."[21]

Here appellant did not show that the Government intended to retain control over the ship, or that it had accepted responsibility for safety operations while repairs were ongoing. Even assuming that the Government's inspectors at least had a duty to correct all dangerous conditions of which they had actual knowledge and that one of them knew that the contractor had removed the safety wires required by 29 C.F.R. § 1501.56 preliminary to the weight test, there is no evidence to charge them with knowledge prior to the accident that any painting would be performed on the lifeboat before the weight test was to be conducted.

Having disposed of the issue of negligence in favor of the Government, it follows that any discussion of the issue of proximate cause is rendered unnecessary. The District Judge correctly concluded that the responsibility for this unfortunate accident must fall upon either the

20. 345 F.2d 134 (2 Cir. 1965).

21. *Id.* at 136.

contractor, appellant, or both, and that the Government cannot be held liable therefor.[22] The Judgment of the District Court of February 16, 1970 will be affirmed.

22. See *Manhat v. United States*, 220 F.2d 143 (2 Cir. 1955), *cert. den.* 349 U.S. 966 (1955); *Morrell v. United States*, 297 F.2d 662 (9 Cir. 1961), *cert. den.* 370 U.S. 960 (1962).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 18,851.

ROY SPEESE,

Appellant

v.

UNITED STATES OF AMERICA

ORDER SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge,* and FORMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
COLLINS J. SEITZ,
Circuit Judge.

Dated: April 2, 1971

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 18,851.

ROY SPEESE,

Appellant

v.

UNITED STATES OF AMERICA

(D. C. Civil Action No. 34-67.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: FORMAN, SEITZ and ALDISERT, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 16, 1970, be and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS F. QUINN,

Clerk.

February 24, 1971

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

CIVIL ACTION No. 34-67.

ROY SPEESE,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

FINAL DECREE.

AND Now, this 16th day of February, 1970, the above-entitled case having been heard upon pleadings and proof and the Court having made detailed Findings of Fact and Conclusions of Law, it is hereby

ORDERED and DECREED that judgment should be and hereby is entered in favor of the United States of America, the defendant, and against the plaintiff, Roy Speese without costs.

MITCHELL H. COHEN,

D. J.

There is no objection to the form of the within Order.

MORRIS M. SHUSTER,

Counsel for Plaintiff.

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY.

CIVIL No. 34-67.

ROY SPEESE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

COHEN, *District Judge:*

Plaintiff, Roy Speese, a 50 year old painter by trade, employed by the New York Shipbuilding Corporation, Camden, New Jersey, instituted this suit in Admiralty pursuant to 46 *U. S. C.* § 741 *et seq.* against the defendant, United States of America, as the owner of a vessel, S. S. Exhibitor, upon which he sustained personal injuries, while painting one of her lifeboats during the course of the entire vessel's repair by the aforesaid New York Shipbuilding Corporation at its yard in Camden, New Jersey. The accident, which occurred on November 5, 1965, is claimed by the plaintiff to have been caused by the negligence of the defendant and/or the unseaworthiness of its lifeboat. The defendant counters by contending that the S. S. Exhibitor had been out of navigation and completely deactivated since 1962 at which time it was placed in the so-called "reserve

mothball fleet''; but that in October, 1965 it was towed as a ''dead load'' from the Hudson River, near West Point, New York to Camden, New Jersey, for complete repair intended for reactivation and reintroduction into navigation as a recommissioned vessel.

The matter was tried to the Court without a jury and in compliance with *Rule* 52, *F. R. Civ. P.*, the Court makes the following:

Findings of Fact.

1. At all times pertinent, the defendant United States of America was the owner of S. S. Exhibitor and the lifeboat in which the plaintiff sustained his injuries.

2. From December 14, 1962 to October 2, 1965, the S. S. Exhibitor was decommissioned, out of navigation, stored without power, crew or cargo in the reserve or ''mothball'' fleet on the Hudson River, near West Point, New York.

3. It was subsequently determined by the Government that the S. S. Exhibitor was to be reactivated and returned to navigation. This necessitated extensive overhaul. After invitation and submission of bids to and by various shipyards, a contract was awarded to the New York Shipbuilding Corporation, Camden, New Jersey. The work involved approximately 499 specific items at a total cost of $440,422.00, and was to be performed between October 4 and November 12, 1965. Among the repair items were approximately twelve in number specifically pertaining to the removal of lifeboats from one of the holds where they were stowed, and their extensive reconditioning and reinstallation in their appropriate places for use, subject to the required inspection and approval by the United States Coast Guard.

4. After being towed, "dead load," from the Hudson River to the shipyard, the vessel was first dry-docked for certain repairs and then refloated pier side for further repairs.

5. On November 5, 1965 at approximately 9:30 A. M., plaintiff was directed by his foreman to go to the vessel's portside lifeboat in the deck area, and to paint its release launching gear (Court's Exhibit A attached) red and to encircle the same by a six inch wide white border. The releasing mechanism is located on the floor of the lifeboat. Its painting was required by one of the specifications in the repair contract.

6. Plaintiff had been employed by the New York Shipbuilding Corporation for approximately 24 years as a painter.

7. Prior to his accident, the plaintiff never painted in a lifeboat. Nor did he receive any precautionary instructions as to the boat in question suspended in an outboard position, and obviously a hazardous undertaking.

8. On the morning of the accident and prior thereto, the port lifeboat had been reinstalled in its proper place in its launching rig and in an outboard suspended position over the side of the vessel at approximately 35 to 50 feet above the pier side and water levels.

9. The lifeboat contained a mechanical disengaging mechanism designed to release its bow and stern falls, or lowering lines, simultaneously upon its entry into the water, in any emergency. The control bar or shaft of the mechanical releasing mechanism had a raised metal plate bearing the notice: "DANGER LEVER RELEASES HOOKS." No such notice or warning was contained on the lever handle itself. (See Court's Exhibit attached.) The shaft and the lever formed a T at their juncture and were located on the floor of the lifeboat.

10. As a safety measure this releasing mechanism was secured by a toggle pin which was inserted through two vertical flanges in such a way that the release lever, which was clamped to a housing bracket on the floor of the boat, could not be lifted until after the removal of the toggle pin. When the pin is removed the lever is lifted vertically, free of its housing bracket, thus roating the pipelike shaft extension to which it is attached and which in turn releases the boat from its davits. This protective device made impossible the accidental release of the launching hooks. (See Exhibits P-1 2and P-13).

11. Prior to the accident, the lifeboat had been secured to its davits by "preventer" wires attached to the launching hooks on each end of the boat, which were designed to prevent the boat from falling free even if the release mechanism was activated. The very purpose of these "preventer" wires was to forestall a "free fall" of the boat by a tripping of the release mechanism. Such protective wires were required by safety regulations promulgated pursuant to *Title* 33 *U. S. C.* § 941(a) *et seq., Protection of Navigable waters and Harbor and River Improvements—Safety Devices, etc.,* and which regulations were applicable to the shipyard on the date in question.[1] These

1. 29 U.S.C. § 1502.56, Safety and Health Regulations for Shipbuilding, provides as follows:

(a) Before employees are permitted to work in or on a lifeboat either stowed or in a suspended position, the employer shall ensure that the boat is secured independently of the releasing gear to prevent the boat from falling due to accidental tripping of the releasing gear and movements of the davits or capsizing of a boat in chocks.

(b) Employees shall not be permitted to remain in boats while the boats are being hoisted into final stowed position.

(c) Employees shall not be permitted to work on the outboard side of lifeboats stowed on their chocks unless the boats are secured by gripes or otherwise secured to prevent them from swinging outboard.

"preventer" wires are used to lock the launching hooks to the davits and are distinct from the fall or lowering lines.

12. On the day in question, and prior to plaintiff's entry into the lifeboat, the "preventer" wires were removed by shipyard riggers, apparently for the purpose of conducting a scheduled launching "weigh test." Such a test is performed by filling the boat with water in a quantity equal in weight to that of three men at approximately 165 lb. each.

13. It is undisputed that the plaintiff entered the lifeboat pursuant to his foreman's directions, unaccompanied by anyone; that upon entering the boat he observed shavings or dirt in the area to be painted, and that, as was customary for painters, he removed a 4 inch flat brush from his pocket preparatory to cleaning the area so that he could commence his painting. Very shortly thereafter, the lifeboat plunged approximately 35 to 50 feet to the mooring pier and then into the Delaware River, resulting in serious injuries to the plaintiff. These rapid events are perhaps best described in the plaintiff's own words.

> "Well, I had instructions from my boat foreman, whose name was Oscar Fritchie. He says, 'Roy, I want you to go up in the port lifeboat in the deck area to paint a gear out. They want you to paint the gear red and an outline border of six inches around white.' That is the instructions I had from my painted boss.
>
> * * *
>
> Then I got two pots of paint, one red and one white, and brushes to do the job with. I went up on the boat and I stepped into the lifeboat, set the pots of paint down and the brushes down. I stepped down in the area where I was to work, and I was about to bend

down to brush shavings out of the way, and the next thing I can remember, I woke up in the hospital." (N. T. pp. 216-217.)

The Court accepts and finds as a fact this version of the unfortunate occurrence.

14. The S. S. Exhibitor is a comparatively old vessel, having been constructed at the Bethlehem Steel Company, Quincy, Massachusetts, in 1940.

15. No testimony was introduced as to the exact date of the construction of the lifeboat in question. However, proof of "moth ball" retirement coupled with the indication in the contract's specifications that the lifeboats stowed in the hold were covered with preservatives, makes the inference reasonable that it was constructed sometime prior to 1962.

16. Inspections and tests of the lifeboat and its launching release mechanism were conducted and approved by an Inspector of the United States Coast Guard on October 7, 11, 15 and November 1, 4 and 5, 1965, all prior to the date of the accident. Further, approval was given by the aforesaid Inspector to the phrasing, legibility and positioning of the release warning legend.

17. Based upon expert testimony presented by the defendant, the release gear apparatus, its markings and placement conformed to and complied with the standards of the United States Coast Guard Regulations at the time in question.

18. On the day in question, the plaintiff was the sole occupant of the lifeboat. No safety "preventer" wires were attached to it, which would have prevented its lowering upon disengagement of the release gear, or the accident would never have occurred. The releasing gear was

activated by someone. The plaintiff was in the lifeboat for a time sufficier to permit his entry therein, placement of his paint pots and his brushes, observe the "shavings" and to bend down in order to brush them aside, when the accident happened. Despite the printed warning on the rotating release shaft, the plaintiff activated the release of the lifeboat proximately causing his own injuries.

19. Further contributing to the fall of the lifeboat was the failure of the shipyard and its employees to provide safety "preventer" wires at the time and place in question.

CONCLUSIONS OF LAW.

1. Jurisdiction of this Court was properly invoked by a maritime employee pursuant to the *Suits in Admiralty Act By or Against Vessels or Cargoes of the United States*, 46 *U. S. C.* § 741 *et seq.*

2. No warranty of seaworthiness extended to the plaintiff because neither the S. S. Exhibitor nor its port lifeboat, both of which were being reconditioned, was in navigation at the time of the occurrence in suit. *West v. United States*, 361 U. S. 118 (1959), affirming 256 F. 2d 671 (3 Cir. 1959).

3. At the time of plaintiff's accident, the pertinent United States Coast Guard Regulations 46 *C. F. R.* (Exhibit P-15), as amended and supplemented, provided as follows:

97.37 Markings For Fire And Emergency Equipment, Etc.,

97.37-1 Application

97.37-1(a) The provisions of this subpart, with the exception of Section 97.37-90, shall apply to all vessels contracted for on or after November 19, 1952. Vessels contracted for prior to November 19, 1952, shall meet the requirements of Section 97.37-90.

97.37-3 General

97.37-3(a) It is the intent of this subpart to provide such markings as are necessary for the guidance of the persons on board ~~in~~ *case of an emergency.* In any specific case, and particularly on small vessels, where it can be shown to the satisfaction of the Officer in Charge, Marine Inspection, that the prescribed markings are unnecessary for the persons on board in case of emergency, such markings may be modified or omitted."

* * *

"97.37-37(e) Where mechanical disengaging apparatus is used, the control effecting the release of the lifeboat shall be painted bright red and shall have thereon in raised letters either the words—'DANGER—LEVER DROPS BOAT', or the words—'DANGER—LEVER RELEASES HOOKS'.

"97.37-37(f) The top of thwarts, side benches and footings of lifeboats shall be painted or otherwise colored international orange. The area in way of the *red mechanical disengaging gear control lever,* from the keel to the side bench, shall be painted or otherwise colored white, to provide a contrasting background for *the lever.* This band of white should be approximately 12 inches wide depending on the international arrangements of the lifeboat." (Emphasis supplied)

On September 8, 1965, and in effect at the time of the plaintiff's accident, was the following Coast Guard Specification for the *manufacturing* of mechanical disengaging for lifeboats:

"160.033-2(a) The requirements of this subpart apply to all new construction. Mechanical disengaging ap-

paratus approved and in use prior to the regulations in this subpart may be continued in service if in satisfactory condition.

* * *

"160.033-3(b) Mechanical disengaging apparatus shall be designed to release both ends of the lifeboat simultaneously under tension, which shall be effected by partially rotating a shaft which shall be continuous and extend from point of contact with the hooks. The control effecting the rotation of the shaft shall be painted bright red and shall have thereon in raised letters the words 'DANGER—LEVER DROPS BOAT'. The control shall be readily accessible; secured to a permanent part of the lifeboat structure, and so installed as not to interfere with the inspection of any removal parts of the lifeboat or its equipment."

As stated in the *Regulation,* the above specification was published in the Federal Register, 46 *C. F. R.,* on August 17, 1949 and the 6th Amendment thereof on September 8, 1965. (Exhibit P-18.)

4. As heretofore indicated, a "grandfather" clause was provided for older vessels in both the Mechanical Specification, 160.033-2(a) supra, and in the Emergency Marking of disengaging apparatus, *Regulation* 97.37-1(a) supra. The latter regulation requires a compliance with Section 97.37-90:

"97.37-90(a) Vessels contracted for prior to November 19, 1952, shall meet the requirements of this paragraph.

"97.37-90(a)(1) The requirements of Section 97.37-5 through 97.37-47 shall be met with the exception that existing signs and markings containing the same general intent, but not necessarily identical wording or

exact letter type, size, or color, may be retained so long as they are in good condition to the satisfaction of the Officer in Charge, Marine Inspection."

The S. S. Exhibitor, as stated above, was built in 1940, remained commissioned in navigation until 1962, and during all of which time its lifeboat release gear had been subject to inspection and approval of the Officer in Charge, Marine Inspection, United States Coast Guard. In light of the saving exemptions of the "grandfather" clauses set forth above, even if the release gear in question, or its warning emergency sign, or the location thereof, deviated from the *Regulations* in force at the time of plaintiff's accident, such deviation constitutes no negligence on the part of the defendant. With respect to these saving provisions, the Officer in Charge of Marine Inspection has been given a very broad discretion in specific cases. *Regulation* 97.37-3(a) supra. Additionally, as provided in the September 8, 1965 "grandfather" clause for preexisting mechanical equipment, *Regulation* 94.20-90, the release gear was exempted:

"94.20-90(a) Vessels contracted for prior to May 26, 1965, shall meet the following requirements: (1) Except as specifically modified by this paragraph, the requirements of §§ 94.20-5 through 94.20-35 [Equipment For Lifeboats, Liferafts, Lifefloats, And Buoyant Apparatus] shall be complied with insofar as the number of items of equipment and the method of storage of the equipment is concerned. Existing items of equipment previously approved, but not meeting the applicable specifications or requirements set forth in §§ 94.20-5 through 94.20-35 may be continued in service so long as they are maintained in a good condition to the satisfaction of the Officer in Charge, Marine Inspection. All new installations or replacements shall meet

the applicable specifications or requirements in this part." (Portion in brackets supplied.)

5. On the day of the accident, the releasing gear mechanism and the warning in regard thereto violated no law or Coast Guard Regulation. Both were adequate for their respective purposes. Both were approved and in use prior to the deactivation of the S. S. Exhibitor and were in satisfactory condition on the day of the accident. The warning legend on the rotating shaft preexisted any requirement that any such notice be placed upon the release lever.

6. The location of the warning language on the release gear was not a proximate cause, either in whole or part, of the plaintiff's injuries.

7. The plaintiff courted his own injuries when he activated the release gear. He cannot, upon any principle of law, predicate his damages upon the defendant's mere ownership of the vessel. Defendant's agents did not control the vessel but exercised only the right of inspection. Such inspection was made in a reasonable and prudent manner and did not insure against the negligence of the shipyard, its employees, or the plaintiff himself.

8. The proximate cause of plaintiff's injuries was his own negligence, or his conduct viewed in conjunction with the negligence of the shipyard's employees in removing the safety wire rigs, or the absence of adequate precautionary instructions by shipyard personnel. *Morrell v. United States,* 193 F. Supp. 705 (N. D. Cal. N. D. 1960) affirmed 297 F. 2d 662 (9 Cir. 1961); *Manhat v. United States,* 113 F. Supp. 595 (S. D. N. Y. 1953), affirmed 220 F. 2d 143 (2 Cir. 1955), *cert. den.* 549 U. S. 966 (1955). In *Morrell,* as in the present case, the plaintiffs were injured by the unexplained fall of a lifeboat in the custody of a shipyard for extensive repairs and overhaul. As is stated at page 706:

"The libelants had been loading provisions into the boat for about ten minutes before it fell with libelants and a painter, who entered the boat to paint the Rottmer release gear lever or handle in the boat. At the time the boat was equipped with 'spanners' and life lines, or man lines, which were installed and available for use, but not in use. The boat was not secured by wire straps known as 'stoppers' or 'preventers' although they were available, having been used the day before during tests on the boat, and having been removed sometime before the accident. The evidence is conflicting as to who removed, or how the wire strap 'preventers' were removed, and the Court finds that the inference established by the weight of the evidence is that they were removed by employees of the contractor."

". . . After the fall the lever of the Rottmer gear was found in an open or release position. The undisputed evidence shows that the painter entered the boat to paint the handle or lever of the release gear red, and after the fall only the top of the lever in a closed position was painted, and the underneath side in that position was unpainted. The evidence is contested as to what happened, if anything, to the release gear lever while the painter was in the boat. Since the fall occurred shortly after the painter entered the boat with the lever of the safety release gear in a 'closed' or 'hold' position before the fall, and was found in an 'open' or 'release' position after the fall, and with the painting of the release lever having been partially completed as indicated, the weight of the evidence preponderates in favor of the inference that the painter tripped or opened the safety release gear, causing the boat to fall, and the Court so finds."

The release handle in *Manhat* appears to be quite similar to that in the present case, the warning being above the lever. 113 F. Supp. at page 596. In *Manhat,* however, the plaintiff was an experienced seaman.

9. The plaintiff, Roy Speese, is not entitled to any recovery from the defendant, United States of America, in this action. Remedy for his unfortunate injuries is confined as a matter of law to proceedings against his employer under the *Longshoremen's and Harbor's Worker's Compensation Act,* 33 *U. S. C.* § 901, *et seq.*

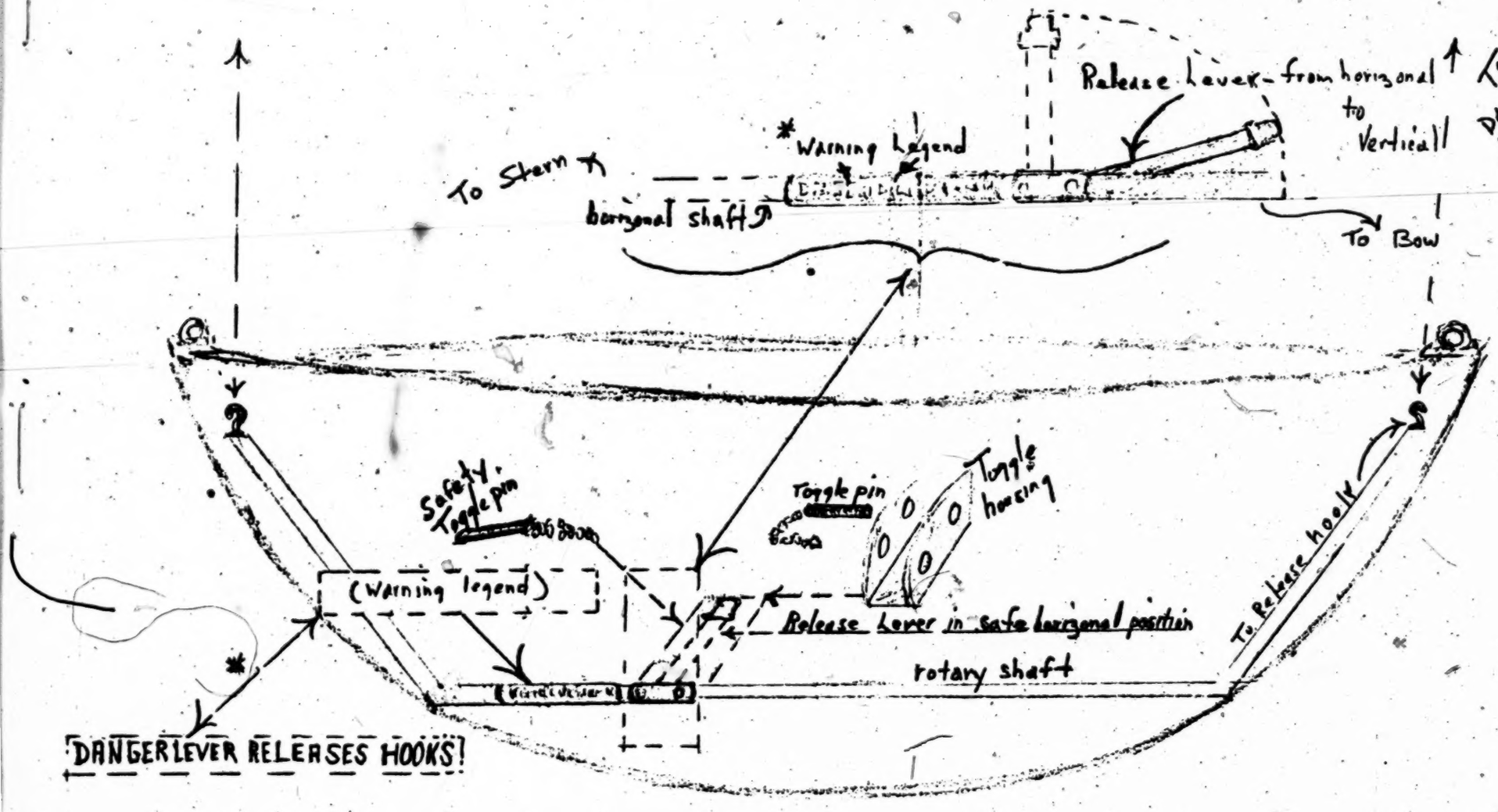
In conclusion, it may be observed that Courts of Admiralty are traditionally alert to the welfare of their wards, seamen and, where appropriate, dockside workers on vessels. The industrial accident and the injuries sustained by this plaintiff are most unfortunate, but such compensation as is available has been limited by Congress to relief under the *Longshoremen's Act,* supra. This Court cannot in good conscience impose liability upon the United States where it does not exist in either fact or law.

Accordingly, judgment shall be entered in favor of the defendant, United States of America.

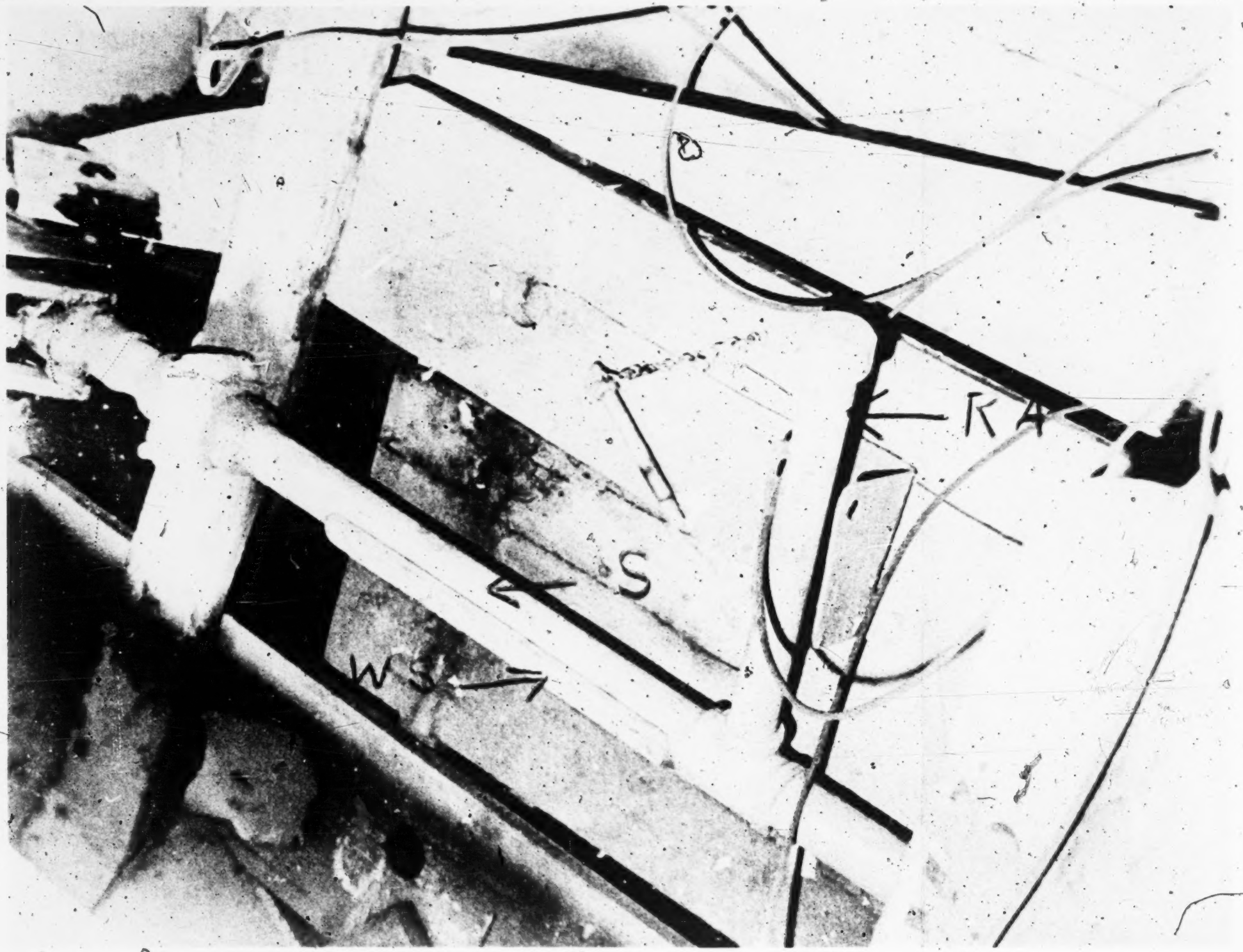
Counsel for the defendant shall submit an appropriate order.

MITCHELL H. COHEN, *Judge*
United States District Court

Findings of Fact and Conclusion of Law-Court's Exhibit A



Court's Exhibit A
(Free hand drawing)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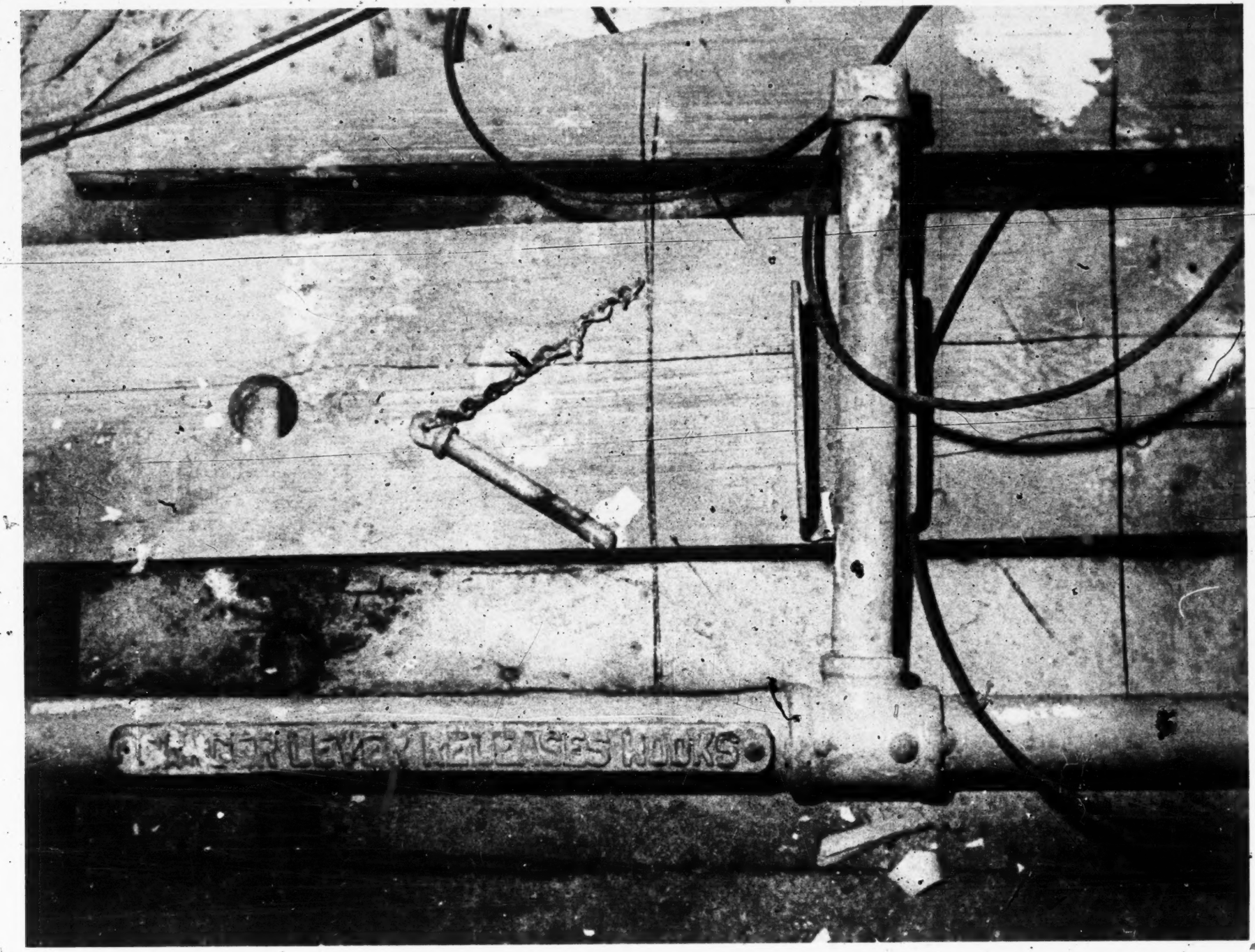
CLEVELAND LEVER WELDING WORKS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-349

ROY SPEESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action under 46 U.S.C. 741 *et seq.* against the United States to recover for injuries sustained by him while engaged in the repair of the S.S. EXHIBITOR, a merchant vessel owned by the government. Following a non-jury trial, the district court held that the government owed petitioner no warranty of seaworthiness and was not guilty of negligence *per se* or of ordinary negligence (Pet. App. 18a-30a). Petitioner appealed only the negligence is-

sues, and the court of appeals affirmed in a comprehensive opinion (Pet. App. 2a-14a; 440 F. 2d 1164).

Petitioner was injured on November 5, 1965, while painting inside the port lifeboat of the S.S. EXHIBITOR. The EXHIBITOR was built in 1940, was decommissioned in 1962, and was stored in the Hudson River "mothball" fleet until October 1965 (Pet. App. 19a, 20a, 23a). At that time, the government contracted with the New York Shipbuilding Corporation, petitioner's employer, for the ship's overhaul in preparation for recommissioning; the contract covered 499 specific items at a cost of $440,422 (Pet. App. 19a). One of the items was removal of the lifeboats from the hold, reconditioning them, and restoring them to the launching rigs (*ibid.*).

On the day of the accident, the port lifeboat was temporarily rigged outboard from its launching rig, in a suspended position over the side of the vessel (Pet. App. 20a). Ordinarily, the lifeboat is held in place by two separate sets of wires: the lowering lines, and the so-called "preventer" wires (Pet. App. 21a-23a). Prior to petitioner's entering the boat, the preventer wires had been removed, and were not in place when the accident occurred (Pet. App. 22a).

Petitioner was a painter, and his foreman instructed him to paint the release mechanism inside the port lifeboat (Pet. App. 20a, 22a). That mechanism was designed to disengage the boat's lowering lines simultaneously, in an emergency, so that it could float free in the water after it had been lowered (Pet. App. 20a); it was protected from unintentional use by toggle pins securing it to the boat's floor (Pet. App.

21a). A notice was printed on the shaft that operates the mechanism, just below where the handle joined it, containing this warning: "DANGER LEVER RELEASES HOOKS." There was no warning on the handle itself (Pet. App. 20a; see photograph at Pet. App. 33a).

Petitioner had never before painted in a lifeboat, and received no instructions from his employer before entering it (Pet. App. 20a). He entered the boat as instructed, alone. He then observed dirt on the boat's floor in the area of the release mechanism and sought to clear the area before beginning (Pet. App. 22a). Immediately thereafter, the boat fell 35 to 50 feet from its outboard position to the river below, seriously injuring petitioner (*ibid.*). The release mechanism had been activated and, without the back-up protection of the preventer wires, resulted in the fall. While petitioner had no specific memory of what happened, the district court concluded that "[d]espite the printed warning on the rotating release shaft, [petitioner] activated the release of the lifeboat proximately causing his own injuries" (Pet. App. 24a).

In this Court petitioner argues only the negligence *per se* claim. He contends, as he did in the courts below, that the government was negligent *per se* because it violated applicable regulations in that the warning sign for the lifeboat's release mechanism was not properly located or properly worded. According to him, regulations effective on and after November 19, 1952, required that the warning be placed on the release lever itself, and other regulations effective in July, 1957, required the warning to read, "DANGER—

LEVER DROPS BOAT." See 17 Fed. Reg. 9474; 22 Fed. Reg. 4021; 46 C.F.R. 97.37-37(e).

1. Contrary to petitioner's assertion, this case does not pose a question of general importance, but involves only the interpretation and application of a narrow regulation. The regulation specifically limits its applicability to vessels "contracted for" after November 19, 1952; as to those "contracted for" prior to that date, "existing signs and markings containing the same general intent, but not necessarily identical wording or exact letter type, size, or color, may be retained so long as they are in good condition to the satisfaction of the Officer in Charge, Marine Inspection." 17 Fed. Reg. 9475, 46 C.F.R. 97.37-90(a)(1) (see Pet. App. 26a-27a). Petitioner argues that the amended regulation applies because it defines "contracted for" as including contracts for material repairs (see 17 Fed. Reg. 9443, 46 C.F.R. 90.05-5(a)); that the 1965 restoration of the EXHIBITOR was such a contract; and that the vessel therefore was "contracted for" in 1965.

Both courts below correctly rejected this argument. Since the EXHIBITOR was built in 1940, it was "contracted for" before 1952. Under the regulation the making of material repairs to a vessel also constitutes "contracting" for the vessel and, as the court of appeals held (Pet. App. 7a, n.8), the "more reasonable interpretation" is that the regulation permits flexibility where either construction or repairs were contracted for before 1952. This interpretation accords with the obvious purpose of the regulation to allow continued use of existing signs and markings

that are adequate;[1] indeed, the Officer in Charge of Marine Inspection has express authority to modify or even to omit markings where circumstances permit. 46 C.F.R. 97.37-3(a) (see Pet. App. 8a, n. 10, and 25a). The warning sign on the release mechanism satisfied the requirement of the regulation for pre-1952 vessels, since it contained "the same general intent" of the amended regulation and received the requisite approval by the officer in charge. Thus, the courts below correctly concluded that the warning on the release mechanism was not contrary to the regulation and that its use by the government was not negligent *per se*.

2. At all events, petitioner would not be entitled to any recovery here, even if his construction of the regulation were accepted. The courts below also found that petitioner's injuries did not result from any purported shortcomings concerning the warning sign—and, therefore, that the alleged violation of the regulation was not the proximate cause of his injury.

The district court concluded that both the release mechanism and the warning sign "were adequate for their respective purposes," and that the location of the

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[1] As a general policy, the government considers that a major or material alteration of a vessel after 1952 would warrant updating its safety features; but "each vessel must be considered on an individual basis as to the degree that 'updating' is feasible, practicable and reasonable." See Navigation and Vessel Inspection Circular No. 12-65, attached as Appendix A. Thus, contrary to petitioner's assertion (Pet. 16), the "uniform mandatory minimum safety standards" are subject to modification depending on circumstances, and the decision below is not in conflict with the intent or purpose of the regulation.

warning on the shaft, rather than on the handle itself, "was not a proximate cause, either in whole or part" of petitioner's injuries (Pet. App. 28a). That court further held that "[t]he proximate cause of [petitioner's] injuries was his own negligence, or his conduct viewed in conjunction with the negligence of the shipyard's employees in removing the safety wire rigs, or the absence of adequate precautionary instructions by shipyard personnel" (*ibid.*).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

APPENDIX A

TREASURY DEPARTMENT
UNITED STATES COAST GUARD

[SEAL]

Address reply to:

COMMANDANT (MMT-4)
U.S. Coast Guard
Washington, D.C. 20226

1 September 1965

NAVIGATION AND VESSEL INSPECTION CIRCULAR
No. 12-65

Subj: Alteration or Modification of Existing Cargo or Tank Vessels; associated safety improvements

1. *Purpose.* To explain the application of 46 CFR 30.01-10 and 46 CFR 90.05-5(a) with regard to certain safety improvements on existing vessels undergoing major alterations.

2. *Background.* From time to time there are proposals to make major alterations to or conversions of all or parts of existing vessels. As contrasted with ordinary service repairs, these proposals may involve replacement or modification of considerable portions of the ship. Jumboizings, extensive renewals, lengthenings, repowerings and conversions for change in service fall into this category. In many cases only a relatively small portion of the completed ship can be identified as existing at the time the work was begun.

3. *Discussion.* As safety standards are revised upward, they are seldom made retroactive, partly on the assumption that with the passage of time existing vessels will be retired from service and only those built

to the newer and higher standard will continue to ply the seas under the American flag. It would also be costly and impractical to require a vessel to satisfy each change in regulations. However, when major alteration programs are carried out, there is a definite intention of extending the service life of existing vessels, and the vessel is necessarily withdrawn from service to accomplish the work. Therefore, it is appropriate, when such substantial changes are contemplated, that careful consideration be given to certain safety details with a view to bringing the vessel into closer compliance with current standards. Each vessel will, of course, have to be considered individually with regard to the extent to which it departs from present day requirements and to the extent it is reasonable and practicable to accomplish such improvements.

4. *Action.* When an existing cargo or tank vessel is to be modernized, jumboized, lengthened or converted to other service, the feasibility of the following improvements in construction standards which contribute materially to safety shall be considered:

(a) Provision of emergency source of power and emergency lighting.
(b) Separation of required fire pumps and their sources of power.
(c) Removal of steam smothering systems and replacement with presently acceptable fixed fire-fighting systems.
(d) Installation of self-closing fire doors in stairways passing through accommodation spaces.
(e) Modification or renewal of the lifesaving equipment as necessitated by proposed changes in manning, service or arrangement, with particular attention given to winches and wire rope falls.

(f) In pump rooms of older tank vessels, segregation of electric motors and pumps to comply with present practice.

(g) Installation of up-to-date CO_2 system in machinery space.

It is again emphasized that each vessel must be considered on an individual basis as to the degree that "updating" is feasible, practicable and reasonable. Full consultation with appropriate OCMIs, technical branches, and/or the Commandant (MMT) by interested shipowners, designers, and shipyards is considered highly desirable before the work specifications are finalized.

/s/ C. P. Murphy
C. P. MURPHY
Rear Admiral, U. S. Coast Guard
Chief, Office of Merchant Marine Safety

DIST (SDL NO. 81)
A: None
B: n(45); c(10); eg(3); q(6); b d p(1)
C: m(4); o(2)
D: i(2); k(1)
E: m(1); o(2)
F: None
List 112-155

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